Supreme Court, U.S.
FILED
OCT 19 1994
OFFICE OF THE CLERK

No. 94-498
IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

SHERRY LINTZ; KEITH LINTZ, SR.; BRIAN ALLEN JACOBS, minor, by next friend Sherry Lintz; KEITH JAMES LINTZ, JR., minor, by next friend Sherry Lintz; RICHELE NICOLE JACOBS, minor, by next friend Sherry Lintz,

Petitioners,

v

LINDA J. SKIPSKI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

FRANK J. KELLEY
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Leo H. Friedman
Assistant Attorney General
Attorneys for Respondents

39 pp

QUESTION PRESENTED

DID THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY HOLD THAT RESPONDENT SKIPSKI WAS ENTITLED TO QUALIFIED IMMUNITY ON THE GROUNDS THAT: (1) BEFORE ITS MAY, 1990, DECISION IN MEADOR v. CABINET FOR HUMAN RESOURCES, CHILDREN IN FOSTER HOMES DID NOT HAVE A CLEARLY ESTABLISHED DUE PROCESS RIGHT TO BE PROTECTED FROM HARM BY STATE FOSTER CARE WORKERS; AND (2) AFTER THE RIGHT WAS CLEARLY ESTABLISHED RESPONDENT'S CONDUCT DID NOT CONSTITUTE DELIBERATE INDIFFERENCE?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INDEX OF AUTHORITIES iv

PARTIES 1

JURISDICTION 1

STATEMENT OF THE CASE 2

Lower Court Proceedings 2
Statement of Facts 5

REASONS FOR GRANTING THE WRIT

THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT RESPONDENT SKIPSKI WAS ENTITLED TO QUALIFIED IMMUNITY BECAUSE BEFORE THE MAY, 1990, DECISION IN MEADOR v. CABINET FOR HUMAN RESOURCES, CHILDREN IN FOSTER HOMES DID NOT HAVE A CLEARLY ESTABLISHED DUE PROCESS RIGHT TO BE PROTECTED FROM HARM BY STATE FOSTER CARE WORKERS, AND AFTER THE RIGHT WAS CLEARLY ESTABLISHED RESPONDENT'S ACTIONS DID NOT CONSTITUTE DELIBERATE INDIFFERENCE 11

1. The Sixth Circuit Correctly Decided The "Clearly Established Right" Aspect Of The Qualified Immunity Question Before It 12

Page

2. The Sixth Circuit Correctly Determined That Respondent's Actions Did Not Constitute Deliberate Indifference 24

3. The Sixth Circuit Correctly Affirmed The District Court's Issuance Of Summary Judgment 30

CONCLUSION 32

RELIEF SOUGHT 33

INDEX OF AUTHORITIES

Pages

Cases

Anderson v. Creighton,
483 U.S. 635 (1987) 13,17

Butz v. Economu,
483 U.S. 478 (1987) 12

DeShaney v. Winnebago County
Dep't. of Social Services,
489 U.S. 189 (1989) 17,18

Doe v. New York City Dep't. of
Social Services, 649 F.2d 134
(2nd Cir. 1981), cert. den.
464 U.S. 864 (1983) 20,21

Eugene D. v. Karman,
889 F.2d 701 (6th Cir. 1989),
cert. den. 496 U.S. 931 (1990)..passim

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 12

K.H. ex. rel. Murphy v. Morgan,
914 F.2d 846 (7th Cir. 1990) 21

Meador v. Cabinet for Human
Resources, 902 F.2d 474
(6th Cir.), cert. den.
498 U.S. 867 (1990) .....passim

Taylor v. Ledbetter, 818 F.2d 791
(11th Cir. 1987) (en banc),
cert. den. 489 U.S. 1065
(1989) 20,21

Youngberg v. Romeo,
457 U.S. 307 (1982) 21,22

Page

Statutes

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 2,14,20

Mich. Comp. Laws § 722.111-118 6

PARTIES

Petitioners have erroneously included the Department of Social Services as a respondent in the caption to their petition. The Department was dismissed from this action by order of the United States District Court for the Western District of Michigan dated November 25, 1992 and Petitioners have never pursued an appeal from this order.

JURISDICTION

Respondents do not dispute this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Lower Court Proceedings:

Petitioners brought this action in the United States District Court for the Western District of Michigan pursuant to 42 U.S.C. § 1983, claiming they were deprived of constitutional rights.

The Cass County Department of Social Services, the employer of Respondent Linda J. Skipski, brought its Motion to Dismiss on Eleventh Amendment grounds (R 46). Respondent Skipski brought a Motion for Summary Judgment on the grounds that the federal claims against her were barred by qualified immunity (R 46).

In its Opinion of November 25, 1992 (Pet. App. 8A-26A), the District Court

held that the Cass County Department of Social Services was a state agency and, therefore, could not be sued in federal court (Pet. App. 14A). The Petitioners chose not to challenge this holding in their appeal to the Sixth Circuit Court of Appeals. Thus, the liability of the State of Michigan and its agency, the Cass County Department of Social Services, is no longer an issue. Nevertheless, in their petition the Petitioners repeatedly make reference to what the State allegedly knew. Because its liability is no longer an issue, what the State of Michigan may or may not have known is now irrelevant and Petitioners' references thereto should not be considered by this Court.

The District Court granted Respondent Skipski's Motion for Summary

Judgment on the grounds that she was entitled to qualified immunity (R 87, R 88, R 94, and R 95). The District Court ruled that Respondent Skipski was protected by qualified immunity because Petitioners failed to show that a clearly established right was violated by Respondent Skipski and failed to show that "a reasonable social worker in Skipski's position should have known that the conduct at issue violated that right." (Pet. App. 17A, 40A.)

Petitioners filed a Motion for Reconsideration which was denied on February 23, 1993 (Pet. App. 40A-41A). With its denial the District Court issued a second opinion determining Respondent acted appropriately and was not liable to Petitioners (Pet. App. 31A-41A).

Petitioners appealed the decision of the District Court to the Sixth Circuit Court of Appeals. On May 25, 1994, the Sixth Circuit issued its Opinion affirming the judgment of the District Court. (Pet. App. 2A-7A.) Petitioners sought reconsideration, which was denied on June 16, 1994. (Pet. App. 1A.)

Statement of Facts:

Petitioner Sherry Lintz is the natural parent of the minor Petitioners Richele Jacobs, Brian Jacobs and Keith Lintz, Jr. (R 87, p 1). Petitioner Keith Lintz, Sr. is the natural father of Keith Lintz, Jr. (R 87, p 1). On May 22, 1987, the Cass County Probate Court made the minor Petitioners temporary wards of the Court pursuant to a neglect petition brought by the Michigan

Department of Social Services (R 87, pp 1-2). By court order, the children were placed in the home of Kendall and Shirley Krause (R 87, p 2).

Mr. and Mrs. Krause were licensed foster care parents pursuant to Mich. Comp. Laws § 722.111-118. (R 87, p 2.) The Krause home was licensed as a foster home not by the State of Michigan, but rather by the Cass County Probate Court (R 86: Ex J, Ex M). The children remained with the Krauses until approximately November 6, 1990, when they were placed in another foster home (R 87, p 2). The children were returned to the home of their natural parents on December 7, 1990 (R 87, p 2).

Petitioner's Complaint with the District Court alleged that during

unspecified times, the minor Petitioners were sexually and physically abused in the Krause home (R 1, R 36). In approximately October of 1990, the children were allegedly sexually and physically abused by Dale Krause (R 87, pp 2-3). Dale Krause is the adopted son of Mr. and Mrs. Krause (R 87, p 3). He was placed with Mr. and Mrs. Krause as a foster child when he was two weeks old and legally adopted by them at the age of two (R 87, p 3). After the allegations of sexual abuse came to light, the children were questioned by Mrs. Krause and Respondent Skipski (R 87, p 3). Mrs. Krause allegedly requested that the children be removed from the Krause home immediately (R 87, p 3). The Krauses were given guidelines or restrictions in regards to caring for four of the chil-

dren during the 30-day period it took to find an appropriate new foster home, which could take all three of the children (R 86: Ex K, Ex L).

On pages 57, 58, 60, 61 and 73 of Exhibit K to R 86, Respondent Skipski discussed the safeguards that were instituted to protect the children during the 30-day period that they were left in the home after the allegations of sexual abuse came to light on October 8, 1990. On pages 49, 50-53, 70-74, 75 and 116 of Exhibit L to R 86, Mrs. Krause discussed the safeguards that she was to implement during the 30-day period that the children were left in the Krause home after the allegations of sexual abuse came to light. Based upon these safeguards, Mr. and

Mrs. Krause kept the children (R 87, p 3). As a result of the accusations against Dale Krause, Mr. and Mrs. Krause took steps to ensure that the children were never in unsupervised contact with Dale Krause (R 87, p 3). There were no allegations of sexual abuse that are specified as having occurred during the 30-day period the children remained in the Krause foster home after the explicit allegations of sexual abuse came to light (R 1, R 36). Approximately a month later, on November 6, 1990, the children were removed from the Krause home (R 87, p 3).

Mark Herman of the Cass County Probate Court testified that the Krause home had been licensed with the Cass County Probate Court since 1969 (R 86:

Ex M, p 10). Respondent Skipski testified that she was not involved with the licensing of foster care homes, and that the Krause foster home was not licensed by the Cass County Department of Social Services (R 86: Ex N).

REASONS FOR DENYING THE WRIT

THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT RESPONDENT SKIPSKI WAS ENTITLED TO QUALIFIED IMMUNITY BECAUSE BEFORE THE MAY, 1990, DECISION IN MEADOR v. CABINET FOR HUMAN RESOURCES, CHILDREN IN FOSTER HOMES DID NOT HAVE A CLEARLY ESTABLISHED DUE PROCESS RIGHT TO BE PROTECTED FROM HARM BY STATE FOSTER CARE WORKERS, AND AFTER THE RIGHT WAS CLEARLY ESTABLISHED RESPONDENT'S ACTIONS DID NOT CONSTITUTE DELIBERATE INDIFFERENCE.

Petitioners seek a writ of certiorari in this case based not on any conflict of decisions or call for an exercise of this Court's power of supervision, but rather on the sole ground that the Sixth Circuit "erred" and the questions presented are "substantial." Pet. p 10. A review of the petition reveals, however, that the questions presented are by no means "substantial" or in need of this Court's

authoritative voice and that the Sixth Circuit decision is sound and legally correct. For these reasons, explained further below, the petition should be denied.

1. **The Sixth Circuit Correctly Decided The "Clearly Established Right" Aspect Of The Qualified Immunity Question Before It.**

The doctrine of qualified immunity recognizes the need of government officials to be free from harassing lawsuits and apprehension of personal liability when they exercise authority and discretion while performing their jobs in the public interest. Butz v. Economu, 483 U.S. 478 (1987).

In Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), this Court held that the doctrine of qualified immunity

affords protection against individual liability for civil damages to officials "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." In Anderson v. Creighton, 483 U.S. 635, 640 (1987), this Court held:

> The relevant inquiry focuses on whether a reasonable official in the defendant's position could have believed his conduct to be lawful, considering the state of the law as it existed when the defendant took his challenged actions.

In the appeal below, Petitioners claimed that Respondent Skipski's failure to protect the Petitioner-children from abuse in a foster home violated their rights to substantive due process, procedural due process and constituted a conspiracy to deprive them of privileges

and immunities under the law. Respondent Skipski asserted that qualified immunity bars the Petitioners from litigating their 42 U.S.C. 1983 claims against her. The Sixth Circuit correctly agreed with Respondent Skipski and no further review by this Court on this relatively straight-forward question is warranted.

The Sixth Circuit Court of Appeals in Eugene D. v. Karman, 889 F.2d 701 (6th Cir. 1989), cert. den. 496 U.S. 931 (1990), which was decided in November 1989, had addressed the issue of whether qualified immunity protected state social workers from the type of claim brought by Petitioners in the instant case. Eugene D., a foster child, brought a 42 U.S.C. 1983 action against

Kentucky social workers alleging that while in foster care, social workers were deliberately indifferent to his serious medical and developmental needs in violation of his Fourteenth Amendment due process rights. The allegations concerned Eugene's care and treatment by his foster parent, which caused him to suffer, among other things, malnutrition, loss of weight and poor hygiene.

Eugene D. alleged that defendants deprived him of his liberty without due process of law by failing to properly monitor and supervise his foster care placement. He further alleged that the state social workers were deliberately indifferent to his serious medical needs by failing to protect him from bodily harm at the hands of his foster parent

of which they knew or reasonably should have known.

The District Court in Eugene D. denied defendant's motion for summary judgment based in part upon defendant's claim of qualified immunity holding:

> [D]uring the period from May, 1974 until December, 1982, it was clearly established 'that there was a constitutional right of a person in custody to be free from harm resulting from deliberate indifference.'

889 F.2d at 704.

Defendants then filed their interlocutory appeal on the immunity issue. The substantive issue before the Sixth Circuit in Eugene D., like the issue in the case at bar, was not whether the Constitution imposed upon the state a duty to assume some responsibility for

the safety and well-being of those it takes into custody, but whether that principle was sufficiently clear in a foster home setting, during the time in question that a reasonable official would understand that what he or she was doing violated that right. Anderson v. Creighton, supra. The court held in Eugene D. that the law was not clearly established, and defendants were therefore entitled to qualified immunity. 889 F.2d at 711.

In its Eugene D. analysis, the Sixth Circuit reviewed this Court's decision in DeShaney v. Winnebago County Dep't. of Social Services, 489 U.S. 189 (1989). Although DeShaney was decided subsequent to the events in Eugene D., the Sixth Circuit quoting from DeShaney stated:

> When the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs -- e.g., food, clothing, shelter, medical care, and reasonable safety -- it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

889 F.2d at 710.

As noted by the Court in DeShaney, 489 U.S. at 201, n 9, and recognized by the Sixth Circuit in Eugene D., there are distinct differences between a custodial setting in an institution versus foster care placement:

> These differences also raise serious questions as to whether foster care placement is sufficiently analogous to institutionalization so that a reasonable official would understand that, as a matter of law, the Fourteenth Amendment's Due Process Clause imposed similar affirmative obligations upon him or her. Cf. DeShaney, 109 S. Ct. at 1006 n 9.

889 F.2d at 711.

The Sixth Circuit went on to hold:

> At some later date our circuit or the Supreme Court may definitively decide whether the placement of a child in a state-licensed foster home which is supervised by state agents is sufficiently analogous to institutionalization to give rise to a constitutionally imposed affirmative duty to protect. However, we are convinced that the differences are sufficient to require us to hold, under an objective legal reasonableness standard, that it was not clearly established at any time during the relevant period that such an obligation existed by virtue of the Constitution. It would therefore be improper to impose personal liability on these defendants on that basis.

889 F.2d at 711.

Thus, Eugene D. constituted the law in the Sixth Circuit as to whether qualified immunity protects social workers from liability for injuries sus-

tained by children in a foster care setting. Qualified immunity does protect social workers from such claims and the courts below correctly concluded Respondent Skipski is, therefore, immune under the doctrine of qualified immunity from the 42 U.S.C. 1983 claims brought by the Petitioners.

The cases that the Eugene D. Court referred to in drawing its distinction between whether a constitutional duty existed at all and whether a principle of law is clearly established are Doe v. New York City Dep't. of Social Services, 649 F.2d 134 (2nd Cir. 1981), cert. den. 464 U.S. 864 (1983), and Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987) (en banc), cert. den. 489 U.S. 1065 (1989). The Eugene D. Court indicated

that Doe and Taylor merely establish whether a constitutional duty existed at all, distinguishing that from the question whether the law is clearly established. 889 F.2d at 711. The Eugene D. Court specifically considered Doe and Taylor and concluded they were not dispositive within the Sixth Circuit. The District Court recognized this when it held:

> [T]hose under the jurisdiction of the Sixth Circuit cannot say, as the [K.H. ex. rel.] Murphy [v. Morgan, 914 F.2d 846 (7th Cir. 1990)] court said, that the rights of children in foster care were clearly established by Youngberg [v. Romeo, 457 U.S. 307 (1982)] because "there was no reason to think that Doe would not be followed in this circuit." 914 F2d at 852. As the discussion in [Eugene D. v.] Karman shows, foster care workers in Michigan had good reason to think that the Sixth Circuit would not follow Doe.

815 F. Supp. at 1069.

In Eugene D. the Sixth Circuit discussed the implications of Youngberg v. Romeo, 457 U.S. 307 (1982), on a State's duty toward children placed in foster care rather than in an institution. As the District Court noted in its February 22, 1993 opinion:

> The [Eugene D. v.] Karman court stated that "a child placed in foster care is at least arguably not in custody in the sense of Youngberg." 889 F2d at 710. The court reasoned that because foster care, by design, provides a home-like setting, "the control the state may exercise over the child and thus the protection it may provide him is diminished."

815 F. Supp. at 1069.

Subsequently, in May 1990, the Sixth Circuit changed direction in Meador v. Cabinet for Human Resources, 902 F.2d 474, 476 (6th Cir.), cert. den. 498 U.S. 867 (1990), and held that due process

extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes.

With the changes in the direction of the law within the Sixth Circuit as enunciated in Meador, the Sixth Circuit applied a rule of reason and determined four months a sufficient period of time for social workers to have learned of the Meador decision and to have adjusted their conduct accordingly. Despite this four-month "notice" period established by the Sixth Circuit, both the District Court and the Sixth Circuit agreed that Respondent's undisputed actions were not sufficiently unreasonable to constitute "deliberate indifference" to the children--the prevailing standard to be applied in such cases. See, Meador, 902 F.2d at 476.

The Sixth Circuit correctly decided the "clearly established right" aspect of the qualified immunity question before it, and no further review by this Court is warranted.

2. The Sixth Circuit Correctly Determined That Respondent's Actions Did Not Constitute Deliberate Indifference.

Having concluded that there was a clearly established right as of May, 1990, for foster children to be free from the infliction of unnecessary harm, the District Court then went on to find that the critical time-period in the instant case was from June, 1990, through November, 1990 (R 94, p 7), the period when the Petitioner-children were in the Krause foster home after the date of the Meador decision.

Because Meador, which the District Court held clearly established the minor petitioners' right to be protected from harm within the foster home, was not handed down until May of 1990, the District Court found:

> Of plaintiffs' allegations, only those that occurred in mid-1990 through the removal of the children from the Krause home in November, 1990, could be considered. The others fall within the period during which foster care workers enjoyed qualified immunity for all their actions in this jurisdiction. Thus, the only claims at issue are the allegations that the October 2, 1990, incident should have prompted an investigation and that the children should have been removed from the Krause home immediately after the allegation of abuse was made on October 8, 1990.

815 F. Supp. at 1070.

As the District Court noted, the documents submitted in connection with

the motion for summary judgment established that when the accusations of sexual abuse were made on October 8, 1990:

> Skipski took immediate action to protect the children. She met with Mrs. Krause and set up safe guards to ensure that the children were fully supervised and would not suffer any abuse before they were moved. Skipski searched for a place to send the children and discussed emergency placement with the attorney for Mrs. Lintz and the guardian ad litem for the children, both of whom apparently opposed moving the children immediately.

Id.

As the District Court further noted, Petitioners assert that the only way to protect the children was to immediately remove them from the Krause home. However, as the District Court stated in its opinion, Respondent Skipski took action to protect the children from harm

and "plaintiff did not have a clearly established constitutional or statutory right to a specific outcome following an investigation." Id. Petitioners also argued that the October 2nd report by the foster mother of the plaintiff boys talking of pulling each others pants down should have resulted in an investigation. However, as the district court held:

> [P]laintiffs have not established that the reports of talk between brothers of pulling each others pants down create a constitutional right to an investigation of the foster placement or any particular action.

Id.

In affirming the District Court's decision in the case at bar, the Sixth Circuit held:

But we agree with the district court that the defendant's actions after May 1990 were not sufficiently unreasonable to constitute "deliberate indifference" to the children - the prevailing standard now being applied in such cases. Norfleet, 989 F.2d at 291; Meador, 902 F.2d at 476.

* * *

On October 2, 1990, Mrs. Krause overheard two of the children in bed talking about pulling each other's pants down, which she reported. On October 8, 1990, the first specific allegation of sexual abuse was made. One of the children told a therapist that he had oral sex with Dale Krause after Dale promised to give him two dollars and to let him play Nintendo. In response to this allegation, Skipski began an immediate investigation. She and the therapist met with the children and Mrs. Krause to discuss the incident. The discussion was renewed at home with Mr. Krause present. Skipski and the Krauses set up safeguards for the children's protection. They ensured that the children would be fully supervised so that no further abuse would occur while Skipski located another home which could accommodate all three siblings. As the district court noted, "Skipski searched for a place to send the children . . . [she] discussed emergency placement with the attorney for Mrs. Lintz and the guardian-ad-litem for the children, both of whom

apparently opposed moving the children immediately." Lintz v. Skipski, 815 F. Supp. 1066, 1069 (W.D. Mich. 1993). There is no allegation of abuse during the month plaintiffs remained in the home before being relocated.

Plaintiffs maintain Skipski should have immediately removed the children from the home on October 8, 1990. Looking at all of the facts, we agree with the district court that defendant did not respond after May 1990 with deliberate indifference. As of October 8th, Skipski had only an accusation to rely on: Dale was not caught abusing the children. Indeed, when confronted, Dale denied the charges. Skipski investigated while she attempted to find a new home where all three children could stay together. Safeguards were instituted to insure the children's safety and within a month the children were removed from the Krause home. The whole affair might have been better handled from the beginning, but that is not the issue. There must be "deliberate indifference," and there was none after the substantive due process right became clearly established. This is the crucial point.

Pet. App. 5A, 6A-7A.

Petitioners' contentions are wholly without merit and are unworthy of this Court's attention. Both the Sixth Circuit and the District Court correctly held that Respondent's actions did not constitute deliberate indifference.

3. The Sixth Circuit Correctly Affirmed The District Court's Issuance Of Summary Judgment.

The District Court correctly applied the standards for summary judgment, and the Sixth Circuit correctly affirmed the District Court by applying established legal principles to a routine question of law. The undisputed facts precluded a reasonable finding of deliberate indifference after the substantive due process right became clearly established. Nothing in the instant petition either calls into question the

soundness of the rulings of the lower courts or presents a question in need of this Court's authoritative voice.

CONCLUSION

The District Court and Sixth Circuit Court of Appeals correctly held that before the May, 1990 decision in Meador, children in foster homes did not have a clearly established due process right to be protected from harm by State foster care workers, and that after the right was clearly established there was no deliberate indifference.

RELIEF SOUGHT

Wherefore, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, MI 48909
(517) 373-1124

Leo H. Friedman
Assistant Attorney General
Attorneys for Respondents

October, 1994